IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 502 OF 2006
IN
NOTICE NO. 1167 OF 2000
IN
SUIT NO. 1448 OF 1984

1. Dr.Amir Fidahusain,
2. Zakir Fidahusain,
3. Humain Fidahusain,
4. Altaf Fidahusain,
5. Sofia Fidahusain,

.. Appellants.

all Bombay, Indian Inhabitants,
R/a. 13 Sea Green,Worli, Sea - Face,Khan Abdul Gafoor Khan Rd., Worli, Bombay -400 018.

V/s.

1. Mohammedhussain Abdullabhai Fidaali of Bombay, R/a.243 Jupiter A'rtment, Cuffe Parade, Bombay -400 005.
2. Zenab Ashfaqbhai Fidaali (Widow of (Ashfaqubhai A.Fidaali), R/a. 18 Princess Street,Fidaali Buldg., 5th Floor, Bombay -400 002.
3. Taherbhai Abdullabhai Fidaali, R/a. 54/1405 Adarsh Nagar, M.I.G.Colony,Century Bazar,B'bay-25.
4. Akhtarhusain Abdullabhai Fidaali
5. Moizbhai Abdullabhai Fidaali,
6. Shabbirbhai Abdullabhai Fidaali
7. Abashbhai Abdullabhai Fidaali

Sr.4 to 7 are R/a. 18 Princess - Street, Fidaali Bldg.,5th floor, Bombay 400 002.

8. Smimbai T. Hussain
R/a. C/o.Mulla Fidaali SK,

..Respondents

Fakruddin, Siddiamber Bazar,
Hyderabad 500 001 A.P.

9. Huseinabai A. Hussain,
R/a. C/o.Mulla Abdulhusainbhai SK,
Fidaali Fidivi,305 Shaikh Colony,
Takli Feeder Rd.,Napgur,(Vidharbha)

10. Fatimabai Abdullabhai Fidaali,
R/a.18 Princess Street, Fidaali
Bldg.,5th floor,Bombay -400 002. ..Respondents

Mr.S.T.Tilokchandani i/by M/s.M.K.Ambalal & Co. for the Appellants.

Mr.Subodh Joshi i/by M/s. N.K.Sabir for the Respondent No.1.

Mr. P.P.Paul i/by M/s.Manu Horkusjee & Co. for the Respondent Nos.3 and 5.

CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATED : 08th SEPTEMBER, 2006.

ORAL ORDER : (Per R.M.LODHA,J.)

. Heard Mr.S.T.Tilokchandani, the counsel for the Appellants.

2. This Appeal is directed against the order dated 12th of June, 2006, whereby the learned single Judge issued notice to the present Appellants (Defendant Nos.10 to 15) under Order 21 Rule 22 of the Code of Civil Procedure to show cause why the consent decree passed on 3rd of December, 1991 be not executed against

them.

3. In our considered view, the impugned order is not a judgment under clause 15 of the Letters Patent and, therefore, the Appeal against the said order is not maintainable. The impugned order is neither interlocutory nor intermediary judgment as categorised by the Supreme Court in the case of **Shah Babulal Khimji vs. Jayaben D. Kania, AIR 1981 SC 1786.** It does not possess the characteristics and trapping of finality inasmuch as it decides nothing and is only initiatory, asking the present Appellants to show cause why the consent decree be not executed against them.

4. The learned counsel for the Appellants however, relied upon the Division Bench judgment of this court in the case of **Laxman Bala Surve vs. M/s. Posh Builders, Bombay, 1996(2)Mh.L.J.858,** in support of his contention that the impugned order is appealable under clause 15 of the Letters Patent.

5. In **Laxman Bala Surve's case,** the issue that arose for consideration before the Division Bench was whether an order passed by a single Judge under Order 21 Rule 23, is an appealable order under clause 15 of the

Letters Patent or Order XLIII of the Code of Civil Procedure. It was considered therein that such order is not appealable under Order XLIII. However, the Division Bench held that such an order is appealable under clause 15 of the Letters Patent. It is pertinent to note that the issue that fell before the Division Bench for consideration in Laxman Bala Surve's case, was with reference to the order passed under Order 21 Rule 23. While dealing with the said aspect, the Division Bench in para 9 of the judgment held thus :-

> "9. From a conjoint reading of Rules 22 and 23 of Order XXI, it is clear that the provisions of Rule 22 are mandatory. The issue of the notice is a condition precedent to the validity of the execution proceedings, unless it has been dispensed with by the Court under sub-rule (2) under certain circumstances. The object of notice under this rule is to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution. If he does so, the court's decision thereon under Rule 23(2) of Order XXI would operate as res judicata in all further proceedings. If, despite the notice, he fails to appear and show cause against execution, the Court is bound under sub-rule (1) of Rule 23 to order execution. Thereupon such person will be bound by the order and cannot go behind it. The order will operate as constructive res judicata against him. In such a case, he cannot, at a later stage, raise any objection to the executability of the decree which he might and ought to have raised in reply to the notice under Rule 22. But, if no notice has been given to him under rule 22, it will be open to him to raise at a later stage any objection as to the executability of the decree."

6. In the present case, the stage of the decision under Order 21 Rule 23 has not arisen inasmuch as by the impugned order, the learned single Judge has issued notice to the Appellants (Defendant Nos. 10 to 15) to show cause as to why the consent decree be not executed against them. There is no order passed by the learned single Judge, ordering execution of the consent decree against the Appellants so far. Upon receipt of the show cause notice, that the court has now issued pursuant to the impugned order, the Appellants shall have the right to appear and show cause to the satisfaction of the court as to why the consent decree should not be executed against them. The court shall consider the cause shown by the Appellants and pass an appropriate order. At that stage, if the Appellants have any grievance they may have a right to challenge such order in appropriate proceedings. However, insofar as the impugned order is concerned, it is only initiatory in nature inasmuch as show cause notice has been issued to the Appellants as to why the consent decree be not executed. There is no order, deciding the rights of the parties either way.

7. In the case of **Mr. Madhukar Venkatesh Ulla vs. M/s. Anita Hermy D'Souza & Ors., in Appeal No.1068 of 2005, decided on 23rd January, 2006** by the Division

Bench of this Court presided over by one of us (R.M.Lodha,J.), while dealing with the order of addition of parties, it was held thus :-

> "22. In so far as an order of addition of parties is concerned, surely, it is not a final judgment. It is so because such order does not decide the questions or issues in controversy in the suit; it does not bring an end to suit or action. Such order is not preliminary judgment as well. By ordering addition of the party, the suit is not disposed of on a preliminary point. The debatable issue is whether the order of addition of party is interlocutory or intermediary judgment as categorised by the Supreme Court and hence appealable under clause 15 of Letters Patent. Our answer is in the negative. For one, such order does not possess the characteristics and trapping of finality in as much as it decides nothing and is only initiatory. The other it does not adversely affect a valuable right of the party directly nor decides an important aspect of the trial in an ancillary proceeding. Such order is only procedural in nature. Ultimately nature and effect of the order would be determinative in holding whether such order is 'judgment' within the meaning of clause 15 of the Letters Patent. Where trial Judge allows an impleadment of the party being either necessary or proper party, what is ordered is the participation of the party in the suit who has not been impleaded by the plaintiff initially. By impleadment of that party neither important aspect of the trial nor ancillary proceedings is decided. Such order even directly does not affect the valuable right of the plaintiff. Merely because the plaintiff has to fight the case against a party unwillingly or that it may to some extent widen the controversy in the suit, that would not mean that his valuable right is directly affected. We find ourselves in agreement with the well considered opinion of the Madras High Court that by addition of a party rights of the parties in any manner are not decided nor the proceedings are determined finally. Where the trial Judge

> allows any impleadment of the party in a given case at best some right of the plaintiff would be affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff has full right to contest the defence that would be set up by the added party and succeed in the suit. By such order, there is no determination of any right or liability nor does it take away substantial right of the plaintiff and, therefore, an order of addition of a party shall not fall within the meaning of the word 'judgment' under clause 15 of the Letters Patent. "

8. The present order, as already indicated above, is only initiatory in nature and does not possess the characteristics and trapping of finality inasmuch as it decides nothing and, therefore, not appealable.

9. In view thereof, the present Appeal is dismissed as not maintainable.

(R.M.LODHA,J.)

(S.A.BOBDE,J.)

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